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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1283

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS,
*Petitioners,*

v.

KANSAS CITY TERMINAL RAILWAY COMPANY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioners Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, John W. Banks, William T. Bandy, Jr., Harvey B. Edwards, Anthony J. Galate, Denver O. Nell, R. Duane Rogers respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 20, 1978.

## OPINION BELOW

The opinion of the Court of Appeals, is reported, at 587 F.2d 903 and appears in the Appendix C hereto. The opinion and order of the United States District Court, reported at 442 F. Supp. 1173, was entered on December 27, 1977, and appears in Appendix B hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 20, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

## QUESTIONS PRESENTED

1. What is the proper legal basis for the jurisdiction of a Federal District Court to review awards of Special Boards of Adjustment created pursuant to Section 3, Second of the Railway Labor Act (45 U.S.C., Section 153, Second)?

2. What are the proper legal standards to be applied by a District Court on such review?

3. Did the District Court and the Court of Appeals apply the proper legal standards for review of Award No. 408 of Special Board of Adjustment No. 605?

## STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Railway Labor Act:

Title 45, Section 3, First (q) which reads as follows:

> "(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk "of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in section 1291 and 1254 of Title 28."



Title 45, Section 3, Second, first paragraph which reads as follows:

> "Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a sys-

tem, group, or regional board of adjustment is dissatisfied with such arangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

## STATEMENT OF THE CASE

This case grows out of a dispute between the Brotherhood of Railway and Airline Clerks (BRAC) and the Kansas City Terminal Railway Company (Terminal Company) concerning the interpretation and application of a collective bargaining agreement between the parties known as the Stabilization Agreement guaranteeing certain employees jobs or compensation and an award of a Special Board of Adjustment in such dispute.[1]

BRAC is the authorized representative for the purposes of the Railway Labor Act (45 U.S.C., Section 151 et seq.) of the employees of the Terminal Company in the craft or class of clerical and related employees, including towermen and telegrapher employees. The individually named petitioners are employees of the Terminal Company in that carrier's Mail and Baggage Department, whose jobs were abolished by the Terminal Company effective June 23, 1975, and July 1, 1975. More than 200 employees of the Terminal Company were aggrieved by this action. The Terminal Company is a "carrier" within the meaning of the Railway Labor Act and governed by the provisions of that statute. It operates equipment and facilities and performs services in connection with transportation by railroad.

On February 7, 1965, BRAC and the railroads of the United States represented by the National Railway

[1] The relevant facts appear at pages 44-106 and 108-126 of the printed joint appendix in the Court of Appeals.



Labor Conference executed a collective bargaining agreement known as the Stabilization Agreement. The Terminal Company is one of the participating carriers and a party thereto. The Stabilization Agreement provides for a category of "protected employees". These are defined as those employees of the Terminal Company, other than seasonal employees, who either were in active service as of October 1, 1965, or who were restored to active service after October 1, 1964 and prior to February 7, 1965, and who also had two years or more of employment relationship as of October 1, 1964, and fifteen or more days of compensated service during 1964. The Agreement requires that "protected employees" be retained in service subject to compensation as provided in the Agreement. The individually named appellants are "protected" employees under these provisions.

Lay-offs may be made by the Terminal Company to the extent permitted by Article I, Section 3 of the Stabilization Agreement in accordance with the criteria and procedures set forth in such section, in the event of a decline in the carrier's business in excess of stated amounts. BRAC and the Terminal Company entered into a Memorandum Agreement, dated July 2, 1970, which provided substitute criteria to be used to measure a decline in the volume of the carrier's business equivalent to but different from criteria provided in Article I, Section 3 of the Stabilization Agreement. Article I, Section 4 of the Stabilization Agreement gives the Terminal Company the right to make force reductions under emergency conditions as there listed, subject to enumerated conditions. If a "protected employee" is furloughed other than in accordance with these provisions, he is entitled to return to service or

compensation until retired, discharged for cause, or otherwise removed by natural attrition.

The Terminal Company in return is given greater rights in the use and assignment of employees represented by BRAC than the carrier possessed under existing agreements. Under Article III, the Terminal Company has the right to make technological, operational and organizational changes and to transfer work and/or employees, and BRAC is required to enter into such implementing agreements as might be necessary for the transfer and use of such employees. Under Article II a "protected employee" loses his protected status in the event of failure to accept employment offered to him by the carrier in his craft in any seniority district or on any seniority roster on the carrier's system as provided by such implementing agreements. This provision enables the Terminal Company to make use of a "protected employee" whose job is no longer necessary.[2]

At the time the Stabilization Agreement became effective, there were twelve departments in existence at the Terminal Company, of which the Mail and Baggage Department was one, with employees who were entitled to the benefits of that Agreement. Effective June 23, 1975 the jobs of approximately 35 employees of the Mail and Baggage Department of the Terminal Company, who were "protected employees" under the Stabilization Agreement, were abolished and they were reduced to furlough status. Effective July 1, 1975, the jobs of 185 additional "protected" employees of the Mail and Baggage Department were abolished and they were reduced to furlough status. Other departments of the carrier operation continued in operation. On

[2] Appendix A to Complaint contains the Stabilization Agreement.



July 2, 1975, BRAC notified the Terminal Company that its action in furloughing the "protected employees" of the Mail and Baggage Department was in violation of the provisions of the Stabilization Agreement and urged the company to rescind its action and order the prompt restoration of such employees to service. BRAC never received a reply to this communication.

Thereafter, BRAC processed claims for the affected employees on the property of the Terminal Company, as required by the provisions of Section 3, First(i) of the Railway Labor Act (45 U.S.C., Section 153, First (i)), up to and including the highest officer of the carrier designated to handle such claims. The grievance claims were denied on the ground that the benefits of the Stabilization Agreement became inapplicable to the employees involved when the Mail and Baggage Department was completely shut down as a result of the termination of a United States Post Office contract.

Article VII of the Stabilization Agreement provides that any dispute between employee and carrier parties thereto may be referred by either party for decision to a Disputes Committee established thereunder. The parties established a Disputes Committee in accordance with these provisions, identified as Special Board of Adjustment No. 605, to hear and determine disputes submitted to it involving the interpretation and application of the Agreement. After the carrier's final rejection of the employee claims BRAC submitted the dispute to Special Board of Adjustment No. 605.

The Terminal Company contended before such Board that "protected employees" lost their protection if the particular department in which they were employed shut down. BRAC contended that such protection ap-

plied to the carrier as a whole and that "protected" employees lost their status only if the entire carrier operation closed. Since the Terminal Company continued to operate the employees involved did not lose their status and did not lose the protection of the Stabilization Agreement simply because a single department in which their jobs were located was shut down. Under the BRAC position, the Terminal Company would be required to utilize the services of the employees involved by transferring them to other departments or operations or to compensate them until retired, discharged for cause, or otherwise removed by natural attrition, or until the Terminal Company completely ceased operations. Under the Terminal Company position, they are entitled to nothing.

On March 17, 1977, Board No. 605 handed down its decision as Award No. 408, a copy of which is attached as Appendix A hereto. In that Award, signed by Neutral Member Robert M. O'Brien, the following conclusions were made:

1. The Stabilization Agreement of February 7, 1965, was applicable to the Baggage and Mail Department of the Terminal Company.
2. The termination of the mail contract which had been in existence between the United States Postal Service and the Terminal Company had the effect of terminating the provisions of the February 7, 1965, Stabilization Agreement as applied to Baggage and Mail Department employees of the Terminal Company because it brought a complete shutdown of the mail facility.
3. The employees of the Terminal Company employed in the Baggage and Mail Department who were qualified as "protected employees" under the Stabilization Agreement whose jobs



were abolished and who were furloughed when the Mail Department ceased operation are not entitled to the benefits flowing from that Agreement.

BRAC and the individual petitioners then filed a complaint in the United States District Court for the Western District of Missouri, Western Division, asking that Court to declare invalid and set aside Award No. 408 on the grounds that Special Board of Adjustment No. 605 had failed, in rendering the Award, to comply with the requirements of the Railway Labor Act and had failed to conform, or confine itself, to matters within the scope of the board's jurisdiction. The Terminal Company filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted and on the further ground that the District Court lacked subject-matter jurisdiction of the controversy. BRAC et al opposed this motion and filed a counter-motion under Rule 56 of the Federal Rules of Civil Procedure for summary judgment.

The District Court found that, although there is a continuing controversy as to guidelines for review of such an award, it had jurisdiction to review the award under the standards for review set forth in Sections 3, First (p) and (q) of the Railway Labor Act (45 U.S.C., Section 153, First (p) and (q)). It further found that such award did not violate the requirements thereof. The District Court therefore granted the Terminal Company's motion to dismiss and denied the cross-motion of BRAC et al for summary judgment.

The Court of Appeals affirmed the District Court's decision.

## REASONS FOR GRANTING THE WRIT

### 1. There Is A Split Among Courts Of Appeal As To The Basis For Judicial Review Of Awards Of Special Boards of Adjustment Created Pursuant To Section 3, Second Of The Railway Labor Act And The Standards Applicable Thereto.

This case raises basic issues which should be decided by this Court with respect to what are the parameters of judicial review of awards of Special Boards of Adjustment created by parties pursuant to the provisions of the first paragraph of Section 3, Second of the Railway Labor Act, which permits labor organizations and railroads to establish such boards by agreement and what findings are required to set aside such awards. (45 U.S.C., Section 153, Second).

Sections 3, First (p) and (q) of the Railway Labor Act (45 U.S.C., Sections 153, First (p) and (q)) provide for limited judicial review of awards of the National Railroad Adjustment Board made under Section 3, First of the statute in suits to either enforce or set aside such awards and confer jurisdiction on appropriate Federal District Courts to set aside those awards in whole or in part on the following grounds: (quoting from Section 3, First (q) of the Act).[3]

> "The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole

[3] Section 3, First (p) of the statute provides for enforcement of awards of the National Railway Adjustment Boards while Section 3, First (q) provides for judicial review of awards by petition of aggrieved employees and carriers. The grounds for setting aside awards are identical in each section.



> or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28."

This Court in its recent decision in *Union Pacific Railroad Co.* v. *Sheehan,* 99 S. Ct. 399, decided December 4, 1978, stated that "Only upon one or more of these bases may a court set aside an order of the Adjustment Board."

However, there are no such statutory provisions relating to Special Boards of Adjustment created pursuant to Section 3, Second of the Railway Labor Act. The first paragraph of that subsection authorizes a carrier or carriers and a labor organization representing a class or classes of carrier employees to create a special board to adjust disputes of the character specified in Section 3, i.e., disputes between an employee or group of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning, rates of pay, rules, or working conditions. Since the resclution of such dispute by an adjustment board is compulsory, *Andrews* v. *Louisville & Nashville R. Co.,* 406 U.S. 320 (1972), Section 3, Second simply authorizes an alternative to the use of a National Railroad Adjustment Board division for such compulsory arbitration. Section 3, Second does not provide, however, for the judicial review of special board awards as is provided by the 1966 amendments to Section 3, First. The second paragraph of Section 3, Second of the statute provides that awards of boards under that paragraph, i.e., so-called Public Law Boards

awards, may be enforced in the same manner and subject to the same provisions for enforcement of compliance with awards of the Adjustment Board under Section 3, First (p), but does not provide as does Section 3, First (q) for judicial review of awards by aggrie ed employees or carriers.

Award No. 408 here involved was not issued by either a division of the National Railroad Adjustment Board or by a Public Law Board created under the second paragraph of Section 3, Second of the statute. It was issued by a Special Board of Adjustment created by BRAC and all of the nation's railroads, including the Terminal Company, which are parties to the Stabilization Agreement to hear and determine disputes arising thereunder. As the District Court found, there is continuing controversy in the courts with respect to judicial review of such awards.

Originally, the Seventh Circuit held that Federal courts had no jurisdiction to review awards of Special Board of Adjustment No. 605 created by the Stabilization Agreement. *Brotherhood of Railway and Airline Clerks* v. *Special Board of Adjustment No. 605* (410 F.2d 520 (7th Cir. 1969). Subsequently in 1977, the Seventh Circuit reversed its holding and held that there was jurisdiction to review awards of Special Boards of Adjustment under Title 28, Sections 1331 and 1337 of the United States Code. *Merchants Despatch* v. *Carmen,* 511 F.2d 1045 (7th Cir. 1977). This decision followed a 1975 decision of the Fourth Circuit, *Employees Protective Association* v. *Norfolk & Western Railway Co.,* 511 F.2d 1040 (4th Cir. 1975), which based jurisdiction to review such awards on Sections 1331 and 1337 and rejected review based on Section 3, First (q) of the Railway Labor Act. On the



other hand the Fifth Circuit has consistently based jurisdiction to review awards of Special Boards on Section 3, First (q). *Brotherhood of Railroad Trainmen* v. *Central of Georgia Railway Co.,* 415 F.2d 403 (1969), *cert. den.* 396 U.S. 1008; *Diamond* v. *Terminal Railway Alabama State Docks,* 421 F.2d 228 (1970) as has also the District Court in which the suit to review the award here involved was brought. *Kansas City Southern Railway Co.* v. *Brotherhood of Railroad Trainmen,* 305 F.Supp. 1142, 1147-49 (1969).

The consequence has been confusion in the standards by which the validity of awards of Special Boards of Adjustment should be measured. Moreover, this Court has not spelled out the precise meaning of the statutory standards set forth in Section 3, First (q) of the Railway Labor Act so that there can be no uniformity in the application of such standards. The Fifth Circuit has attempted to do so in the *Central of Georgia* and *Alabama State Docks* cases cited above as discussed *infra,* pages 15, 16.

**2. This Continuing Controversy Has Produced In The Present Case An Unfair Result Substantially Impairing The Protection Of The Stabilization Agreement.**

The basic issue presented to Special Board of Adjustment No. 605, which rendered Award No. 408, was whether the benefits of the Stabilization Agreement between BRAC and the Terminal Company became inapplicable to "protected employees" of a particular department of the railroad when the operations of that department ceased, but the operations of the railroad as a whole continued. Award No. 408 says "yes". The board does not measure that result against either the language of the agreement or custom and practice thereunder.

The board does say that the agreement is silent on what happens if the entire railroad shuts down. But it fails to examine the language of the agreement, which deals with the carrier and the decline of its business as a whole and not with departments thereof on a compartmentalized basis, with respect to the very different problem of a shut-down of a single department. Nor does the award make any effort to inquire into the custom and practice of the parties under the agreement which showed that over a ten-year period from 1965 to 1975 the agreement had been consistently applied to employees of railroads and terminal companies whose mail handling operations had been shut down, like those of the Terminal Company, by loss of Post Office contracts.

Indeed, the board award rests on the finding that the employees involved were unable to exercise their seniority in any other facilities of the Terminal Company, a conclusion for which no authority of any kind (either in the agreement or in custom or practice thereunder) is cited. The only part of the agreement dealing with the transfer of employees from one department to another (Article III) permits the railroad to transfer "protected employees" to any job within the craft for which the employee is qualified and requires the employee to accept such transfer which is just the opposite of the board's finding.

BRAC et al therefore brought suit to set aside the awards. The complaint invoked the jurisdiction of the District Court under both Sections 3, First (p) and (q) of the Railway Labor Act and Title 28, Sections 1331 and 1337 of the United States Code because petitioners were uncertain of the basis of jurisdiction in light of the split among the circuits with respect thereto. The



complaint also alleged that Special Board of Adjustment No. 605 had not complied with the requirements of the Railway Labor Act in issuing Award No. 408 and that the award did not conform with, or confine itself, to matters within the scope of the board's jurisdiction. In its motion to dismiss the complaint, the Terminal Company argued that Sections 1331 and 1337 could not serve as a basis for jurisdiction and that suit could be brought, if at all, only under Sections 3, First (p) and (q) of the Railway Labor Act.

This position squarely raised what is to be inquired into by a District Court under Section 3, First (q) to make judgment on the allegations of the complaint. The parameters of such an inquiry were spelled out by the Fifth Circuit in the *Central of Georgia* case, *supra,* page 13, and was relied upon by BRAC et al in this case. In that case the Court (pages 411-414) discussed the scope of judicial review and found that an "award without foundation in reason or fact" is equated with an award that exceeds the authority or jurisdiction of the arbitrating body. The Court concluded as follows:

> "We conclude therefore, that the district court properly inquired into whether the awards are, in the language of the Senate Committee Report, "actually and undisputedly without foundation in reason or fact". This standard is similar to the Gunther standard: the question is whether 'the Board's interpretation was wholly baseless and without reason.' 382 U.S. at 261. As the district court fairly stated:
>
> " 'Whether we regard the Board as primarily an administrative tribunal, or as primarily a board of arbitration (it partakes of the nature of both), it must act responsibly, and if it, as an administrative tribunal, is construing and interpreting an agreement its interpretation must find some basis

in the language of the written agreement, or in the conduct of parties under that language, or in some uniform custom and practice concurred in by the parties.' "

Assuming *arguendo* that the conclusions of the Fifth Circuit constitute an accurate interpretation of the scope of judicial review under Section 3, First (p) or (q) (except for a claim of fraud), and neither the Terminal Company, the District Court, or the Court of Appeals expressed a different interpretation, there should have been an inquiry into whether Award No. 408 in such manner drew its essence from the collective bargaining agreement. See: *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Further, since it was the position of the Terminal Company that the Stabilization Agreement was silent with respect to its application to the situation involved, there should have been a specific inquiry into custom and practice under the agreement. No such inquiry was made by either Special Board of Adjustment No. 605, the District Court, or the Court of Appeals.

Indeed, the Court of Appeals finds (page 11) that "the key to the Board's decision" is the finding by the Board that because "Mail and Baggage Department employees could not exercise seniority to take positions elsewhere in other departments, those employees could not be transferred to new work," so that the employer could have an effective claim to their services after their jobs were abolished. There is only one provision of the agreement dealing with "use and assignment" of employees by the employer. That is Article III. Its provisions are:

1. Section 1 provides that an employee loses his protective status for failure to retain or obtain a



position available to him in the exercise of his seniority rights.

2. Section 2 provides that an employee loses his protective status for failure to accept employment in his craft offered to him by the carrier in any seniority district or on any seniority roster throughout the carrier's system as provided in implementing agreements required under Section 3.

3. Section 3 provides that a carrier may make technological operational and organizational changes and shall have the right to transfer work and/or transfer employees throughout the system which do not require the crossing of craft lines.

Nowhere is there any provision in the agreement that "protected employees" could not be transferred to new work if their department shuts down" and neither the Special Board, the Terminal Company, the District Court decision, nor the Court of Appeals decision can cite any such provision. Likewise, there is no such practice under the agreement nor has anyone cited such a practice in support of such alleged fact. Inquiry into the agreement and custom and practice thereunder by the District Court instead of dismissing the complaint would have revealed this gross misstatement of fact which the Court of Appeals decision states is the "key" to Award No. 408.

The Court of Appeals in footnote 6 to its decision states that it does not think the portions of the Agreement cited by BRAC "permit us to set aside the Board's finding on this point." This conclusion misses the issue entirely. BRAC did not ask the Court of Appeals to set aside the Board's finding on the basis of Article III. Its position was that the key finding by the Board was not and did not purport to be based on lan-

guage of the agreement (the award cited none and the only transfer provision did not rationally support the "key" finding) nor upon any custom and practice under the agreement and thus the Board exceeded its jurisdiction. Article III was cited only to demonstrate that there was a very real issue which should have been inquired into by both the Board and District Court but was not so examined.



## CONCLUSION

The District Court decision recognizes that there is a continuing controversy over the guidelines for review of awards made under Section 3 of the Railway Labor Act. This uncertainty manifests itself both in confusion as to the guidelines for review under Sections 3, First (p) and (q) and in disagreement as to the basis for review of Special Boards created under Section 3, Second. Such confusion is apparent in the present case. It should be resolved by this Court so that the precise standards of review for all adjustment board awards are clear. This is particularly so since such awards are the product of compulsory arbitration of employee grievances and disputes involving the interpretation and application of collective bargaining agreements. Confidence in and acceptance of the results of such a compulsory process demands that confusion as to the standards applicable to the making of awards and the review thereof be clear as possible so as to eliminate so far as possible the predilections of individual arbitrators. The petition should be granted.

Respectfully submitted,

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**Date: February, 1979**

# APPENDIX

**APPENDIX A**

AWARD No. 408

Case No. CL-110-W

**SPECIAL BOARD OF ADJUSTMENT NO. 605**

**Parties to Dispute**

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

and

Kansas City Terminal Railway Company

**Question at Issue**

(1) Does the February 7, 1965 Agreement apply to the employes of the Baggage and Mail Department of the Kansas City Terminal Railway Company?

(2) Does the loss of a mail contract, between the U.S. Postal Service and the Kansas City Terminal Railway Company, nullify the provisions of the February 7, 1965 Agreement?

(3) Are the employes of the Kansas City Terminal Company who were employed in the Baggage & Mail Department and who qualified as protected employes under the provisions of the February 7, 1965 Agreement, entitled to continue receiving the benefits flowing from that Agreement until such times as they are deprived of those benefits under the express terms of such Agreement?

**Opinion of Board**

The Kansas City Terminal Railway Company is admittedly a party to the February 7, 1965 Stabilization Agreement. Inasmuch as the Terminal did not have any net revenue ton miles or gross operating revenue, however, the

parties hereto had negotiated a substitute formula as required by Article I, Section 3 of the February 7, 1965 Agreement and the November 24, 1965 Interpretations. Due to the United States Postal Service terminating the mail handling contract with the Terminal, the Terminal closed their Mail and Baggage Department on July 1, 1975. Accordingly, all positions in the Mail and Baggage Department were abolished effective June 30, 1975. As a result, approximately two hundred employees in the Terminal's Mail and Baggage Department were furloughed effective June 30, 1975.

It is the Organization's position that the Terminal is still actively engaged in business notwithstanding that cancellation of the United States Postal Service contract with the Terminal relative to the handling of mail indeed resulted in a major loss of business for the Terminal. They submit that when the parties negotiated the substitute formula agreement, said agreement applied to the Terminal Company in its entirety, not merely to separate Departments thereof. Thus, the Organization contends that the February 7, 1965 Agreement applied to the Mail and Baggage Department as an integral part of the Terminal Company, not as a separate and distinct facility as now contended by the Company. Accordingly, it is their opinion that inasmuch as the Terminal Company is still engaged in business, the February 7, 1965 Agreement remains in full force and effect; and that the employees entitled to protection thereunder should have been retained in service until retired, discharged for cause, or otherwise removed by natural attrition as required by the February 7, 1965 Agreement. Thus, when the employees heretofore working in the Mail and Baggage Department were furloughed on June 23 and on June 30, 1975, the Terminal Company thereby violated the provisions of the February 7, 1965 Agreement since said employees were protected employees as provided by that Agreement and are thereby entitled to be



returned to service and compensated as provided by that Agreement.

The Terminal Company retorts, however, that the Mail and Baggage Department was one of several facilities owned and operated by them, but was a separate and distinct facility from the others. There was one separate seniority roster for the Mail and Baggage Department employees, although all employees had a common seniority date. None of the employees in the Mail and Baggage Department, however, had displacement rights to any other Department in the Terminal Company. The Terminal Company maintains that the February 7, 1965 Agreement provides protection to employees in the event of a decline in business. However, when an entire facility is terminated, such as occurred in the instant case when the Company completely terminated their Mail and Baggage facility, they assert that the February 7, 1965 Agreement is thereby inapplicable. Inasmuch as the Claimants could not exercise their seniority to other Departments within the Terminal Company, the Terminal Company thereby had no effective claim to their service, and as a result, the protective benefits provided by the February 7, 1965 Agreement were thereby inapplicable to those employees furloughed as a result of the loss in mail handling business.

A thorough review of the record at hand compels this Board to conclude that the February 7, 1965 Stabilization Agreement was intended to provide protection to employees in the event of a decline in the Carrier's business. Said Agreement was not intended, in our opinion, to accord protection to employees when the work previously performed by them disappears entirely. The February 7, 1965 Agreement simply did not address the question of what was to happen when there was a complete cessation of the Company's business. And merely because the Terminal Company was still engaged in activities separate and apart from mail handling, this nonetheless does not alter the

fact that the mail handling work previously performed by the Claimants was completely abolished when the United States Postal Service vitiated their contract with the Terminal Company.

Although the facts in Award No. 352 of this Board are distinguishable from those now before us, this Board nonetheless considers the reasoning enunciated in Award No. 352 applicable to the instant dispute. There, the Board held that the parties did not contemplate a complete cessation of Carrier's business when they negotiated Section 3 of Article I of the February 7, 1965 Agreement. This Board concurs in the reasoning therein and deems it applicable to the instant case. Accordingly, when the Terminal Company completely closed their Mail and Baggage Department effective July 1, 1975, we hold that the protective provisions of the February 7, 1965 National Agreement were thereby inapplicable to those employees furloughed as a result of the closing of the Company's Mail and Baggage facility. It matters not that the Terminal Company is still a corporate entity engaged in other business separate and distinct from mail handling. The Claimants who were furloughed on June 23 or June 30, 1975 held seniority in the Mail and Baggage Department, and were at this time unable to exercise their seniority to positions in any of the other facilities maintained by the Terminal Company. In the light of this, this Board must find that the Terminal Company was not required to accord them the protective benefits required by the February 7, 1965 Agreement. Their work simply ceased to exist and there was no reasonable likelihood that they would ever be recalled to mail and baggage service as contemplated by Section 3 of Article I of the February 7, 1965 Agreement.



**Award**

Question No. 1 answered in the affirmative.

Question No. 2 disposed of as per Opinion of the Board.

Question No. 3 answered in the negative.

/s/ ROBERT M. O'BRIEN
Robert M. O'Brien
Neutral Member

Dated: Washington, D. C.
March 17, 1977

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DISTRICT

No. 77-0545-CV-W-3

January 3, 1978

Filed, December 27, 1977

BROTHERHOOD OF RAILWAY, AIRLINE, AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *et al.*,
*Plaintiffs,*

v.

KANSAS CITY TERMINAL RAILWAY CO.,
*Defendant.*

### ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This is an action by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) against the Kansas City Terminal Railway Co. asking that the Court review and declare invalid an award by the Special Board of Adjustment No. 605 (Award No. 408) issued in a dispute involving the interpretation and application of a collective bargaining agreement known as the Stabilization Agreement.

The plaintiff is an unincorporated labor organization which is the duly authorized representative pursuant to the provisions of the Railway Labor Act (45 U.S.C. § 151 et seq.) of the craft or class of clerical and related employees, as well as Towermen and Telegraphers of the defendant terminal company. The defendant company is a "carrier" within the meaning of the Railway Labor Act.

On February 7, 1965 there was executed pursuant to the provisions of the Railway Labor Act a collective bargaining agreement between all of the nations railroads represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees and the employees of such carriers represented by five railroad labor organizations. The agreement has been in effect since February 7, 1965.



The Stabilization Agreement provides for a category of "protected employees". Reductions in the numbers of protected employees in the work force may be made by the defendant Terminal Co. in the event of a decline in the carriers business in excess of stated amounts according to criteria and procedures set forth in Article I Section 3 of the Agreemnt as supplemented by a July 2, 1970 agreement.

In June and July of 1975 the jobs of approximately 210 employes of the Mail and Baggage Department who were protected employees under the Stabilization Agreement were abolished and they were reduced to furlough status when the defendant lost its mail contract with the U.S. Postal Service and the Mail and Baggage Department was closed. After exhausting grievance procedures within the terminal company, the plaintiff submitted the dispute to a disputes committee established under the Stabilization Agreement pursuant to 45 U.S.C. § 153. The Special Board of Adjustment 605 in considering the three issues formulated and submitted by the plaintiff determined that the February 7, 1965 agreement applied to employees of the Mail and Baggage Department. However, the Board concluded that the agreement was intended to provide protection to employees in the event of a decline in the carrier's business rather than to protect employees when the work performed by them disappeared entirely.

Although the parties in this case are not in disagreement over the applicable standard of review, there has been a continuing controversy over the guidelines for review under § 153. This Court finds that § 153 Second, second paragraph providing that compliance with awards shall be

enforced in the same manner and subject to the same provisions that apply to proceeding for enforcement of compliance with awards of Adjustment Boards, adopts the standard of review explicitly set forth in § 153 First (p) and (q). Barrett v. Manuf. Rw. Co., 326 F. Supp. 639, 643-44 (E.D. Mo. 1971) aff. 453 F.2d 1305 (8th Cir. 1973). This standard of review applies to boards created under the provision of § 153 Second whether the board is created by paragraph one or two of that section. Kansas City So. Rw. Co. v. Brotherhood of RR Trainmen, 305 F. Supp. 1142 (W.D. Mo. 1969).

Judged by these standards the findings and order of Special Board 605 is conclusive on the parties and may be set aside only for (1) failure of the board to comply with the requirements of the chapter; (2) fraud or corruption of the members of the board; or (3) failure of the order to confine itself to matters within the scope of its jurisdiction. There is no contention by BRAC that grounds for review exist under either of the first two provisions. Therefore, award 408 of Special Board 605 must be upheld unless the Board is shown to have acted outside the scope of its jurisdiction. In the arbitration context an award that exceeds the authority or jurisdiction of the arbitration body is an award without foundation in reason or fact. To merit judicial enforcement an award must have a basis that is at least rationally inferable if not obviously drawn from the letter or purpose of the collective bargaining agreement. Brotherhood of RR Trainmen v. Central of Ga. Rw. Co., 415 F.2d 403 (5th Cir. 1969) c.d. 496 U.S. 1008 (1970).

In applying this standard the federal district court for the Eastern District of Missouri in Transportation-Communication Employees Union v. St. Louis-San Francisco Rw. Co., 296 F. Supp. 507 (E.D. Mo. 1968) found that when the plaintiff requested a ruling that the arbitration board had exceeded its jurisdiction by wrongly interpreting part of an agreement it was really requesting the Court to rule that the board's interpretation was incorrect. Judge Meredith concluded that this would not be a ruling on the jurisdiction of the Board but a review on the merits and it was clear that the courts were not to substitute their opinion for that of the Boards. Similarly BRAC in this case is asking the Court to consider all facts presented to the Board and substitute the Court's interpretation of the Agreement for that of the Board. However, this Court will not substitute its opinion as to the correct interpretation of the agreement for the Board under the pretext that the Board exceeded the scope of its jurisdiction.



In light of Section 1, Article VII of the Agreement providing that any dispute involving an interpretation or application of the terms of the agreement should be referred to a committee and the decision thus arrived at is final and binding, it is clear that this dispute was correctly submitted to the Board and that the Board had jurisdiction to decide the issues involved in this cause. After reviewing the decision of the Board to ascertain if it exceeded the scope of the Board's power, this Court can only conclude that Award 408 is not wholly baseless and completely without reason. Thus, the Court is unable to find that Special Board 605 exceeded its jurisdiction. There being no other basis for reviewing the Board's decision under § 153 the Court hereby

ORDERS that the defendant's motion to dismiss is granted and that plaintiff's motion for summary judgment is denied.

/s/ RUSSELL G. CLARK
Russell G. Clark, Judge
UNITED STATES DISTRICT COURT

Dated: December 27, 1977

## APPENDIX C

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS, *Appellants,*

v.

KANSAS CITY TERMINAL RAILWAY COMPANY, *Appellee.*

No. 78-1082.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 13, 1978.

Decided Nov. 20, 1978.

Before ROSS and HENLEY, Circuit Judges, and MARKEY,* Chief Judge.

ROSS, Circuit Judge.

The issue raised in this case requires the court to consider whether a special board of adjustment, convened pursuant to 45 U.S.C. § 153, Second of the Railway Labor Act, has rendered a decision which fails to confine itself to matters within the scope of the Board's purisdiction.

As set out in the opinion of the district court, the plaintiff-appellant, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees [hereinafter BRAC], "is an unincorporated labor organization which is the duly authorized representative pursuant to the provisions of the Railway Labor Act * * *

* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.



of the craft or class of clerical and related employees, as well as Towermen and Telegraphers of the defendant terminal company." The defendant-appellee, Kansas City Terminal Company [hereinafter Terminal Co.], "is a 'carrier' within the meaning of the Railway Labor Act."

BRAC and Terminal Co. are parties to a collective bargaining agreement executed in 1965 known as the "Stabilization Agreement." The agreement establishes a classification of "protected employees" who "will be retained in service subject to compensation as hereinafter provided unless or until retired, discharged for cause, or otherwise removed by natural attrition."

The jobs of over two hundred employees in the Terminal Company's Mail and Baggage Department were eliminated by the company in 1975, and the employees who had held those jobs were then reduced to furlough status. This occurred because the Terminal Co. lost its contract to serve the U. S. Postal Service, and the company consequently closed its Mail and Baggage Department.

BRAC challenged the Terminal Company's decision as violative of the Stabilization Agreement, contending that the furloughed employees were "protected employees" who must be retained in compensated service.

After exhausting the Terminal Co.'s grievance procedures, BRAC requested the submission of the dispute to a special board of adjustment, as provided for under the terms of the Stabilization Agreement and the Railway Labor Act. *See* 45 U.S.C. § 153, Second. BRAC submitted three issues to Special Board of Adjustment No. 605 for its resolution:

> (1) Does the February 7, 1965 Agreement apply to the employes of the Baggage and Mail Department of the Kansas City Terminal Railway Company?
>
> (2) Does the loss of a mail contract, between the U. S. Postal Service and the Kansas City Terminal Rail-

way Company, nullify the provisions of the February 7, 1965 Agreement?

(3) Are the employes of the Kansas City Terminal Company who were employed in the Baggage & Mail Department and who qualified as protected employes under the provisions of the February 7, 1965 Agreement, entitled to continue receiving the benefits flowing from that Agreement until such time as they are deprived of those benefits under the express terms of such Agreement?

The Board's neutral member issued an opinion answering these three questions in a decision which was favorable to the Terminal Co.: the Board concluded that the Baggage and Mail Department employees were *not* entitled to the protective benefits of the Stabilization Agreement.

BRAC then brought the instant action for review by the district court, pursuant to 45 U.S.C. § 153, Second, requesting the court to declare the order of the Board invalid. However, the district court found no basis on which to set the Board order aside, and BRAC appealed to this court. We affirm.

As the district court did, we begin by setting out the standard of review which is circumscribed by statute.

The Railway Labor Act provides specifically for district court review of orders of the National Railway Adjustment Board (NRAB), a 34-member body created by the legislative act for dispute resolution. 45 U.S.C. § 153 First, (p) and (q) permit judicial review of NRAB orders to the following extent:

> The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in



> whole or in part, or remanded to the division, [1] for failure of the division to comply with the requirements of this chapter, [2] for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or [3] for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.[1]

45 U.S.C. § 153, First (q).

Although a decision of a special board of adjustment, *not* the NRAB, is under review in this case, the district court concluded, and the parties agree, that the same statutory standards are applicable.

[1] Special boards of adjustment are created under the authority of 45 U.S.C. § 153, Second,[2] and the last sentence of that section states: "*Compliance with such awards shall be enforcible* by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board." (Emphasis added). We conclude that courts may consider an application to *set aside* special board orders on the same bases

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[1] Subsection (p) of the Act provides:

> The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

[2] That section allows the carrier and a representative of the employees to establish tribunals to resolve disputes otherwise referable to the NRAB.

as well, and have inferentially approved this holding before. *See Transportation-Communication Division v. St. Louis-San Francisco Railway Co.*, 419 F.2d 933, 935 (8th Cir.), *cert. denied*, 400 U.S. 818, 91 S.Ct. 34, 27 L.Ed2d 45 (1970). *Accord, Barrett v. Manufacturers Railway Co.*, 326 F.Supp. 639, 643-44 (E.D.Mo.1971); *Kansas City Southern Railway Co. v. Brotherhood of Railroad Trainmen*, 305 F.Supp. 1142, 1147 W.D.Mo.1969); *Transportation-Communication Employees Union v. St. Louis-San Francisco Railway Co.*, 296 F.Supp. 507, 508-09 (E.D.Mo. 1968).

The parties agree that neither failure to comply with the requirements of the chapter, nor fraud and corruption by a member of the board, is at issue. The sole basis for the requested relief is that the order given did not confine itself to matters within the scope of the Board's jurisdiction.

The parties and the district court all rely on two court of appeals cases from the Fifth Circuit, *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.* 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008, 90 S.Ct. 564, 24 L.Ed.2d 500 (1970), and *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970), but emphasize different language in those opinions.

[2] We conclude that the *holdings* of those opinions require enforcement of board orders as not beyond the scope of the Board's jurisdiction unless the award is "without foundation in reason or fact," *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., supra*, 415 F.2d at 414; making that determination requires that a court refer to the language and purpose of the collective bargaining agreement:

> [W]e are concerned with whether the Board's award made "final and binding" by the Railway Labor Act is not final and binding, but may be set aside by a court because the Board did not have au-



thority to make it. That case, *Brotherhood of Railroad Trainmen v. Central of Ga. Ry. Co.*, 5 Cir., 1969, 415 F.2d 403, is controlling here. We there stated:

> "* * * In the arbitration context, an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction on the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. * * *"

*Brotherhood of Railroad Trainmen v. Central of Ga. Ry. Co.*, 5 Cir. 1969, 415 F.2d 403, 411-412. An Adjustment Board order is not "conclusive," we then determined, when it is "so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement as to 'manifest an infidelity to the obligation of the arbitrator.' " *Id.* at 415, citing *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). See also *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257, 261, 86 S.Ct. 368, 371, 15 L.Ed.2d 308 (1965); *Safeway Stores v. American Bakery & Con. W. I. U., Local 111*, 5 Cir., 1968, 390 F.2d 79.

Under the circumstances of this case, therefore, the District Court was required to enforce the Adjustment Board's award unless that award is "without foundation in reason or fact." *This test of the Board's jurisdiction is not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the*

*remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of that contract.*

*Diamond v. Terminal Railway Alabama State Docks, supra,* 421 F.2d at 233 (emphasis added).[3]

In a more cryptic but similar statement this court has concluded: "[O]ur function is limited solely to determining whether the arbitration decision draws its essence from the collective bargaining agreement * * *" *General Committee of Adjusment v. Burlington Northern, Inc.,* 563 F.2d 1279, 1282 n.1 (8th Cir. 1977).

The decision by Special Board No. 605 made the following holdings in connection with its award favoring the Terminal Co.: (1) the Stabilization Agreement protected employees in the event of a decline in business, but did not address the problem of a complete cessation of a part of the company's business; (2) the Mail and Baggage Department employees were on a separate seniority roster and could not exercise their seniority to work in other departments of the company; (this fact was apparently gleaned from an affidavit submitted by the Terminal Co.; the decision fails to cite the source of this conclusion); (3) the work in the Mail and Baggage Department had ceased to exist, with no reasonable likelihood the employees would be recalled to service in that department.

The Board writes:

> A thorough review of the record at hand compels this Board to conclude that the February 7, 1965 Stabilization Agreement was intended to provide protection to employees in the event of a decline in the Carrier's business. Said Agreement was not intended, in our opinion, to accord protection to employees when the work previously performed by them disappears entirely. The February 7, 1965 Agreement simply did not address the question of what was to happen when there was a complete cessation of the Company's business. And merely because the Terminal Company was still engaged in activities separate and apart from mail handling, this nonetheless does not alter the fact that the mail handling work previously performed by the Claimants was completely abolished when the United States Postal Service vitiated their contract with the Terminal Company. * * * The Claimants who were furloughed on June 23 or June 30, 1975 held seniority in the Mail and Baggage Department, and were at this time unable to exercise their seniority to positions in any of the other facilities maintained by the Terminal Company was not required to accord them the protective benefits required by the February 7, 1965 Agreement. Their work simply ceased to exist and there was no reasonable likelihood that they would ever be recalled to mail and baggage service as contemplated by Section 3 of Article I of the February 7, 1965 Agreement.

[3] The appellant BRAC relies on language from the Fifth Circuit's *Central of Georgia* case, *supra,* 415 F.2d 403, which approved the district court's statement that an arbiter's construction and interpretation of a contract "must find some basis in the language of the written agreement, or in the conduct of parties under that language, or in some uniform custom and practice concurred in by the parties." *Id.* at 414. It is apparent that the appeals court considered this a restatement of its "without foundation in reason or fact" standard. *Id.*



BRAC argued to this court that the district court opinion makes no findings with respect to whether the award has any basis in the language of the Stabilization Agreemnt, in the conduct of the parties under the Agreement, or in any uniform custom and practice concurred in by the parties, and that an examination of these factors does not sustain the district court's decision to approve the award.

Specifically, with respect to the document; BRAC contends that it establishes a protective agreement between

th union and the entire carrier operation, not just a department thereof; that work force reductions under Article I, Section 3 [4] are permitted on a carrier's decline in business as a whole, and do not concern a decline in a particular department; that Article II, Section 2 requires a "protected employee" to accept employment in his craft offered to him by the carrier in any seniority district or on any seniority roster throughout the railroad system; and that Article III, Section 1 allows the carriers "to make technological, operational and organizational changes" and thereby to "transfer work and/or transfer employees" throughout the carrier's system within the craft or class in which the employee works. The gist of BRAC's argument with respect to the latter two points is that both tend to show that the Agreement was written to affect the carrier's operations as a whole, not a particular department, and that protected employees could be retained in service by being transferred.

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[4] Article I, Section 3, provides in pertinent part:

> In the event of a decline in a carrier's business in excess of 5% in the average percentage of both gross operating revenue ton miles in any 30-day period compared with the average of the same period for the years 1963 and 1964, a reduction in forces in the crafts represented by each of the organizations signatory hereto may be made at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent the said decline exceeds 5%.

Pursuant to a "Memorandum of Agreement" between BRAC and Terminal Co. substitute criteria were developed to measure a decline in business replacing "Revenue Ton Miles" and "Gross Operating Revenue" because it was agreed that those criteria were inapplicable to this particular railway company.



BRAC also argues that the award has no basis in the conduct of the parties under the Agreement,[5] or in any uniform custom and practice concurred in by the parties.

[3, 4] This court must review the decision as rendered for its rationality; it is not to embark on its own reading of the Agreement or, to substitute an improved interpretation of the contract. We do not think it can be said that the decision of the Board is not rationally inferable from the language and purpose of the contract. We understand the Board's reasoning to be as follows.

The Mediation Agreement set out the rights of protected employees and the circumstances under which they would be protected. One such circumstance was an overall *decline* in the carrier's business. In that situation protected employees were provided job security to a certain extent, and, beyond that point, the employer was allowed to make reductions in his work force. Restoration of the carrier's business then required furloughed employees to be recalled.

However, the problem of a complete *cessation* of a portion of the carrier's business had not been addressed, and, according to the Board, "[s]aid Agreement was not intended, in our opinion, to accord protection to employees,

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[5] Here BRAC argues that no other carriers had attempted to argue that the loss of mail handling had the effect of not protecting mail department employees; that a decline in "lineal feet of mail handled" was *one* of the factors for measuring *decline* of business and reduction of forces; that a 1968 agreement between the parties excluded employees in the mail department hired after October 1962 from inclusion under the Stabilization Agreement, thus implying that earlier-hired employees were entitled to protective benefits. BRAC in this regard points to a paragraph in a 1969 agreement which allows the Terminal Co. to furlough 115 junior employees *without* job protection if the nonrail mail contract with the Post Office is cancelled. The 1969 Agreement also provided that it would "not establish a precedent or prejudice the position of either party under the present Job Stabilization Agreement • • •.

when the work previously performed by them disappears completely." Unlike a decline in business, "there was no reasonable likelihood that [employees] would ever be recalled to mail and baggage service as contemplated by [those sections of the Agreement which protected employees in the event of a decline]."

Moreover, due to the fact as found by the Board that Mail and Baggage Department employees could not exercise seniority to take positions elsewhere in other departments, those employees could not be transferred to new work. This is the key to the Board's decision, for implicit in it is the view that protective benefits for employees under the Agreement required that the employer have an effective claim to employee services either now (via transfer) or in the future (via recall). In our opinion the Board felt it would be an anomalous reading of the Agreement to *allow* an employer to reduce work forces when business declined, but require him to retain employees he could not foreseeably use at all.

We have carefully examined the Agreement's language relied upon by BRAC, as well as the custom and conduct cited in support of its interpretation, and we are not persuaded that any of BRAC's arguments rob the Board's decision of its rationality.[6]

Accordingly, the judgment of the district court is affirmed.

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[6] According to BRAC, the Board's conclusion that the Mail and Baggage Department employees could be transferred is incorrect. We do not think the portions of the Agreement cited by BRAC permit us to set aside the Board's finding on this point.